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No. 92-1885

In The

Supreme Court of the United States

October Term, 1993

STATE OF ALASKA,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

CHARLES E. COLE
Attorney General

JOHN P. GRIFFIN
Assistant Attorney General
Counsel of Record
State of Alaska
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-3600

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ARGUMENT

The State of Alaska, petitioner, provides the following reply to several points first raised by the United States in its Opposition:

1. The United States correctly points out (Opp. 10, n.9) that there is a conflict between Circuits regarding the source of the rule in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), as well as its scope. Here the Ninth Circuit's decision implicitly holds that a bar on State *parens patriae* standing is a necessary part of the "threshold requirements of standing under Art. III" when the defendant is the United States. (Pet. App. 4a) This conflicts with the

decision of the D.C. Circuit in *Maryland People's Counsel v. FERC*, 760 F.2d 318 (D.C. Cir. 1985) (Scalia, J.), which held that the bar is merely prudential. *Id.* at 321-22 ("the Supreme Court's failure to assign any element of federalism to the 'core' standing requirement" indicates that *Massachusetts v. Mellon* embodies the "prudential component" of standing). Contrary to the United States' assertion, this inter-circuit conflict provides an additional persuasive reason to grant certiorari: a ruling from this Court will either obviate the conflict, or give Congress notice of whether it can provide States with this much needed authority by legislation. While the United States naturally believes that resolution of this conflict can wait, such an approach is prejudicial to the States, the courts of appeal, and Congress. The United States has made no showing that the indefinite delay it advocates would actually benefit this Court or advance a federal interest.

2. The United States errs when it asserts that "court of appeals decisions since [*Alfred L.*] *Snapp* [*& Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982),] have uniformly recognized that States do not have standing as *parens patriae* to sue the United States." (Opp. 9) In fact, the most recent D.C. Circuit opinion to address the issue expressly relied upon *Snapp* to grant *parens patriae* standing to several State agencies in an action challenging FERC licensing decisions. *United States Dep't of Interior v. Federal Energy Regulatory Comm'n*, 952 F.2d 538, 544 n.4 (D.C. Cir. 1992). Another D.C. Circuit panel has held that the *parens patriae* doctrine is unsettled after *Snapp*. *Alaska v. United States Dep't of Transp.*, 868 F.2d 441, 443 n.1 (D.C. Cir. 1989). In addition, the Eleventh Circuit recognized that the statement in *Snapp* relating to State standing to

sue the federal government was dictum, but found there was no need to directly address this aspect of *Snapp* under the facts before it. *Chiles v. Thornburgh*, 865 F.2d 1197, 1208-09 (11th Cir. 1989) (no need to directly address the issue because other plaintiffs adequately represented the concerns raised by the Governor of Florida). *Accord Texas v. Mosbacher*, 783 F. Supp. 308, 316 (S.D. Tex. 1992) (no prejudice to State of Texas in denying it *parens patriae* standing against federal government "since the individual plaintiffs and the class will in all likelihood resolve the State's concerns").[1]

3. The United States asserts that "the court's statement [in *Department of Interior*] regarding *parens patriae* standing was unnecessary to its disposition of the case" because two environmental groups were making " 'identical substantive challenges.' " (Opp. 10) The United States misreads that case: the court was not saying that the claims of the States and the environmental groups were identical, but that the claims of the Department of Interior were identical to some of the claims made by the States and the environmental groups; as a result, the court did not need to directly address the issue of whether the Department of Interior had standing. *Department of Interior*, 952 F.2d at 544 n.4. The court's holding with respect to the *parens patriae* issue was necessary to its disposition of the case because without it the court

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[1] In contrast, the State of Alaska is now the only plaintiff capable of challenging the Park Service's cabin regulations, regulations that have virtually eliminated the legal use of remote cabins on Park Lands in clear violation of Congress's intent under ANILCA.

would have been unable to address the unique claims of West Virginia. 952 F.2d at 548-49.[2]

4. The United States argues that the D.C. Circuit should itself resolve the differences between its panels. (Opp. 11) Yet, that the D.C. Circuit has suffered considerable confusion since *Snapp* adds support for a grant of certiorari. *Compare Department of Interior,* 952 F.2d at 544 n.4 (Edwards, R. B. Ginsburg, and D. H. Ginsburg, JJ.) (holding that States have standing to sue the federal government on behalf of their citizens), *with Maryland People's Counsel,* 760 F.2d at 320 (Scalia, Mikva, and Ginsburg, JJ.) (accepting that States do not unless Congress provides otherwise), *and with Alaska v. United States Dep't of Transp.,* 868 F.2d at 443 n.1 (Starr, Robinson, and Buckley, JJ.) (holding that the issue is unsettled). Of most importance here, however, is that the Ninth Circuit's decision conflicts directly with *Department of Interior* as to the scope of *Snapp,* and with *Maryland People's Counsel* as to the source of the *Mellon* rule. This Court therefore has not been asked to address the "internal difficulties" of a

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[2] The United States also contends (Opp. 10) that 16 U.S.C. 825*l*(a) and (b) provided a basis for State standing in *Department of the Interior* apart from the *parens patriae* doctrine. The short answer is that the D.C. Circuit nowhere purported to rely upon that statute for purposes of its standing analysis; instead, it expressly relied upon *Snapp* for the proposition that States have *parens patriae* standing to sue the federal government. 952 F.2d at 544 n.4. Of course, if the Ninth Circuit is correct, 16 U.S.C. 825*l* is unconstitutional, as it would lower the "threshold requirements of standing under Art. III." (Pet. App. 4a)

single panel, as was the case in *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).[3]

CONCLUSION

The petition squarely presents the issue of whether States may have standing on behalf of their citizens to sue an agency of the federal government when that agency fails to carry out the mandates of a law passed by Congress. The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. COLE
Attorney General

JOHN P. GRIFFIN
Assistant Attorney General,
Counsel of Record
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600
Counsel for Petitioner

August 1993

[3] In *Wisniewski*, the Eighth Circuit certified to this Court the question, "Does the phrase 'any substance' as employed in 26 C.F.R., Section 175.121, 1952 Cumulative Pocket Supplement, include tax paid distilled spirits?" 353 U.S. at 901. This question, however, had been answered just a year and a half before by a different panel of the Eighth Circuit in the same case. *Id.* The later panel certified the question because of "doubts" about the earlier opinion. *Id.* at 902. In a *per curiam* decision, this Court found that these circumstances were not "the occasion for invoking so exceptional a jurisdiction of this Court as that on certification." *Id.* The instant case is not comparable.